

1996

State of Utah v. Paul Burningham : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

D. Bruce Oliver; Attorney for Defendant.

Steven Neil Merce; Deputy Salt Lake District Attorney; E. Neal Gunnarson; Salt Lake District Attorney; Attorneys for Plaintiff.

Recommended Citation

Brief of Appellant, *Utah v. Burningham*, No. 960656 (Utah Court of Appeals, 1996).
https://digitalcommons.law.byu.edu/byu_ca2/475

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

IN THE UTAH COURT OF APPEALS

50
.A10

DOCKET NO. 960656-CA

STATE OF UTAH,

Plaintiff/Appellant,

v.

PAUL BURNINGHAM,

Defendant/Appellee.

Case No. 960656-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM THE DISMISSAL-WITH-PREJUDICE OF AN
INFORMATION CHARGING THE DEFENDANT/APPELLEE WITH
DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL, DRIVING
ON A SUSPENDED LICENSE, AND FAULTY EQUIPMENT, IN
DIVISION II OF THE THIRD JUDICIAL DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE
LEON A. DEVER, PRESIDING.

STEPHEN NEIL MERCER (6931)
Deputy Salt Lake District Attorney
E. NEAL GUNNARSON
Salt Lake District Attorney
2001 South State Street, Suite S3700
Salt Lake City, Utah 84190-1210
Telephone: (801) 468-3422
Attorneys for Appellant

D. BRUCE OLIVER (5120)
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888
Attorney for Appellee

FEB 13 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

	:	
STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 960656-CA
	:	
PAUL BURNINGHAM,	:	
Defendant/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM THE DISMISSAL-WITH-PREJUDICE OF AN
INFORMATION CHARGING THE DEFENDANT/APPELLEE WITH
DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL, DRIVING
ON A SUSPENDED LICENSE, AND FAULTY EQUIPMENT, IN
DIVISION II OF THE THIRD JUDICIAL DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE
LEON A. DEVER, PRESIDING.

STEPHEN NEIL MERCER (6931)
Deputy Salt Lake District Attorney
E. NEAL GUNNARSON
Salt Lake District Attorney
2001 South State Street, Suite S3700
Salt Lake City, Utah 84190-1210
Telephone: (801) 468-3422

Attorneys for Appellant

D. BRUCE OLIVER (5120)
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES, STANDARD OF REVIEW, PRESERVATION	1-2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
POINT I PURSUANT TO RULE 25(c) OF THE UTAH RULES OF CRIMINAL PROCEDURE, ORDERS OF DISMISSAL SHOULD BE CONSTRUED AS WITHOUT PREJUDICE UNLESS OTHERWISE EXPLICITLY STATED	5
POINT II THE DEFENDANT WAS NEVER ENTITLED TO A DISMISSAL-WITH-PREJUDICE	7
A. HE HAD A DUTY TO MITIGATE	7
B. HE WAS NEVER DENIED THE OPPORTUNITY TO HAVE A FAIR TRIAL	8
CONCLUSION	11
APPENDIXES	
A. Memorandum in Support of Motion for Reconsideration (Dever)	
B. Findings of Fact, Conclusions of Law, and Order of Dismissal (Dever)	
C. Docket for case 955017625 TC (Palmer)	
D. State's Motion to Dismiss Without Prejudice (Palmer)	
E. Order of Dismissal (Palmer)	
F. Defendant's Motion to Dismiss (Dever)	

TABLE OF AUTHORITIES

STATE CASES

<u>State v. Griffiths</u> 752 P.2d 879 (Utah 1988)	7, 8
<u>Salt Lake City v. Dorman-Ligh</u> 912 P.2d 452 (Utah App. 1996)	5, 6
<u>State v. Christofferson</u> 793 P.2d 944 (Utah App. 1990)	7, 8, 9

OTHER JURISDICTIONS

<u>Arizona v. Youngblood</u> 488 U.S. 51, 102 L.Ed.2d 281, 109 S.Ct. 333 (1988)	9, 10
<u>California v. Trombetta</u> 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984)	10
<u>State v. Kull</u> 688 P.2d 1327 (Ore. 1984)	9

RULES OF CRIMINAL PROCEDURE

Rule 16 of the Utah Rules of Criminal Procedure	2, 8
Rule 25 of the Utah Rules of Criminal Procedure	2, 5, 6, 10

IN THE UTAH COURT OF APPEALS

	:	
STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 960656-CA
	:	
PAUL BURNINGHAM,	:	
Defendant/Appellee.	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

Pursuant to Rule 26(3) of the Utah Rules of Criminal Procedure (URCrP), which allows the prosecution to appeal from a final order of dismissal, the State of Utah appeals the trial court's dismissal of this case. This Court has subject matter jurisdiction because the appeal is taken from a criminal case in a court of record. §78-2a-3(f) Utah Code Annotated (UCA).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

In this appeal, the State raises these two issues: (1) May an order of dismissal be construed as a dismissal with prejudice if it does not explicitly so state?; and (2) May a trial court issue a dismissal with prejudice if the criminal defendant has made no showing that a bar to further prosecution is the only way in which he may be treated fairly? These issues concern questions of law which are reviewed for correctness. State v. Ramirez, 817 P.2d 774 (Utah 1991). These issues

were preserved for review by the State in its memorandum in support of its motion for reconsideration submitted on August 9, 1996. See Memorandum in Support of Motion for Reconsideration, at appendix A. The trial court thereafter declined to hear further argument regarding the issues raised in the State's motion for reconsideration, and instead executed its final order of dismissal on October 2, 1996. See Findings of Fact, Conclusions of Law, and Order of Dismissal, at appendix B.

RULES OF CRIMINAL PROCEDURE

This appeal does not directly implicate any specific statutory or constitutional construction, but rather it regards the construction to be given to Rules 16 and 25 of the Utah Rules of Criminal Procedure (hereinafter URCrP). URCrP 16 addresses discovery in criminal cases, and URCrP 25 addresses the dismissal of criminal cases without trial. In relevant part, these rules provide:

“If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule [pertaining to discovery], the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, *or it may enter such other order as it deems just under the circumstances.*

URCrP 16(g) (emphasis added).

- (a) In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.
- (b) The court shall dismiss the information or indictment when:
 - (1) There is unreasonable or unconstitutional delay in bringing the defendant to trial...
- (c) The reasons for any such dismissal shall be set forth in an order and entered into the minutes.
- (d) If the dismissal is based upon grounds that there was unreasonable delay, ... *further prosecution for the offense shall not be barred...*

URCrP 25 (emphasis added).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal taken by the State from a final order of dismissal of a criminal information entered by Judge L. A. Dever of Division II of the Third Judicial District Court, in and for Salt Lake County.

Statement of the Facts

On May 17, 1995, the defendant, Paul Burningham, was arrested for driving while under the influence of alcohol and for driving on a revoked license. Charges arising from this incident were filed by the State on May 30, 1995, and the case was assigned to Judge Phillip K. Palmer with the case number 955017625 TC. As the case progressed toward trial, the State encountered some difficulty in obtaining a video cassette recording of the arrest because the Highway Patrol trooper had been reassigned from Salt Lake County to Green River, Utah. On October 23, 1995, Judge Palmer heard the defendant's motion pertaining to a complaint that the State had committed a discovery violation by its failure to provide the tape. In that motion, the defendant did not seek to continue the trial so he could view the tape, or seek the tape's exclusion as evidence in the State's case-in-chief, but rather he sought as his exclusive remedy the dismissal of the case. Judge Palmer denied the defendant's motion, but the State was ordered to complete discovery within five days. Docket for case 955017625 TC, at appendix C. The State was unable to obtain the video within that time, and the State therefore submitted a motion to dismiss on October 31. See State's Motion to Dismiss, at appendix C. The State's motion explicitly sought that the dismissal be *without prejudice*. *Id.* The order of dismissal was executed by the Court on November 1, 1995. See Order

of Dismissal, at appendix E. Nothing in the order of dismissal stated that it was intended to have any effect contrary to the State's motion that the case be dismissed without prejudice. *Id.*

On November 27, 1995, after obtaining the tape, the State re-filed charges and the case was assigned to Judge Dever with case number 955039908 TC. The case then progressed toward trial until May of 1996 before the defendant filed the motion for dismissal before Judge Dever. See Defendant's Motion to Dismiss, at appendix F. In that motion, the defendant asserted that Rule 41 of the Utah Rules of Civil Procedure barred the re-filing of a case once it had been voluntarily dismissed, and that the State had voluntarily dismissed this case by its motion of October 31, 1995. *Id.* The defendant further asserted that he was entitled to attorney's fees as a result of the State's renewing of the case. *Id.* Argument was heard by Judge Dever on August 5, 1996, and although Judge Dever agreed with the State that the defendant erroneously relied on the Rules of Civil Procedure since URCrP 25 specifically addressed the dismissal of criminal cases without trial, the judge nevertheless raised sua sponte the issue that Judge Palmer may have intended that his order of dismissal be construed as a bar to further prosecution; he then ruled that the earlier dismissal had been with prejudice because the State had not submitted its motion for dismissal-without-prejudice until more than five days after Judge Palmer directed the State to complete discovery. Judge Dever later declined the State's motion to reconsider his ruling. The written order of dismissal prescribed by URCrP 25(c) was executed on October 2, 1996. See Findings of Fact, Conclusions of Law, and Order of Dismissal, at appendix B.

SUMMARY OF THE ARGUMENT

The State argues that the dismissal-with-prejudice was entered in error for these two reasons: (1) The order of dismissal entered by Judge Palmer and construed by Judge Dever did not explicitly state that it would bar further prosecution, and was not accompanied by any statement of reasons that would support a dismissal-with-prejudice, moreover, it was issued incident to the State's motion to dismiss without prejudice, therefore the State was unfairly surprised by Judge Dever's ruling; and (2) The defendant was never entitled to a dismissal-with-prejudice because less severe remedies would have afforded him a fair trial.

ARGUMENT

I. Pursuant to URCrP 25(c), Orders of Dismissal Should be Construed as Without Prejudice Unless Otherwise Explicitly Stated.

The rule governing the procedures to be followed in the dismissal of criminal cases without trial is exclusively contained in URCrP 25. Rule 25(c) requires that orders of dismissal must be accompanied by a statement of the reasons for dismissal, and this provision has been construed by the Utah Court of Appeals as warranting the vacation of an order of dismissal for not recording specific findings. Salt Lake City v. Dorman-Ligh 912 P.2d 452, 456 (Utah App. 1996).

In Dorman-Ligh the issue on appeal concerned dismissal-with-prejudice as the sanction for actions the trial court characterized as prosecutorial misconduct. Id. at 454. Although the Court of Appeals held in Dorman-Ligh that the trial court had erroneously determined that it had issued a binding order to the prosecutor, the court went on to criticize the trial court's elected sanction, stating:

“Dismissal of a criminal information as a sanction against the prosecutor is rarely appropriate, even if the prosecutor is in contempt of court. A dismissal can only be entered pursuant to Rule 25 of the Utah Rules of Criminal Procedure. Rule 25(a) provides for dismissal, in the trial court’s discretion, “for substantial cause and in the furtherance of justice.” Utah R.Crim.P. 25(a). Rule 25 (b) mandates dismissal for “unreasonable or unconstitutional delay” and for other very specific reasons. Utah R.Crim.P. 25(b). In the rare case in which the trial court dismisses a criminal information because of misbehavior by the prosecutor, the court must enter findings that carefully specify which Rule 25 provisions it relied upon. See Utah R.Crim.P. 25(c) (“The reasons for any such dismissal shall be set forth in an order and entered in the minutes.”).

Id. at 456 (emphasis added).

The State acknowledges that Dorman-Ligh was not published until after Judge Palmer’s order of dismissal was entered. The State asserts, however, that Judge Dever erred in failing to construe the order of dismissal in light of Dorman-Ligh’s guidance. This is so because without a statement of specific findings justifying a dismissal-with-prejudice, the State is not afforded notice that the clock has begun to run with respect to the State’s right to take an appeal-as-of-right from a final order of the court. Such a result as was reached by Judge Dever is particularly harsh under the facts of this case, where the order of dismissal had been issued incident to the State’s motion to dismiss *without prejudice*, and where that order was executed by Judge Palmer without any further comment. If a dismissal may be construed as with prejudice even if it does not explicitly so state, then the State is placed in a substantially unfair position.¹

¹ The State acknowledges that it was within the power of the State to have drafted its original order of dismissal to explicitly state that it was *without* prejudice, and thus render this question moot, but even so, as set forth in part two of this argument, because the defendant was never entitled to dismissal-with-prejudice, Judge Dever should not have construed Judge Palmer’s order to have granted the defendant any relief to which he was not entitled.

II. The Defendant was Never Entitled to a Dismissal-With-Prejudice.

A. The Defendant had a Duty to Mitigate.

As quoted above, this Court has stated that it is the rare circumstance when dismissal is an appropriate remedy for prosecutorial misconduct--even if the prosecutor acts in contempt of court. Id. This view of the law is consistent with the position taken in cases where the prosecutor has failed to provide complete or timely discovery. These cases, as illustrated below, stand together for the proposition that a defendant has an affirmative obligation to mitigate any violation of the rules of discovery that might be encountered, and a defendant is only entitled to the remedy of dismissal-with-prejudice if no lesser remedy would afford a fair trial.

In State v. Griffiths, 752 P.2d 879 (Utah 1988), the prosecutor failed to disclose to defense counsel statements made by the defendant to an investigating officer until shortly before trial. Id. at 882. Those statements were inconsistent with the account offered by an alibi witness, and when the prosecutor offered the statements to rebut the alibi, the defense counsel objected; when the statements were admitted over the objection, the defendant moved for a mistrial. Id. In reviewing the issue raised by the defendant on appeal, the Utah Supreme Court ruled that the defendant's appropriate remedy for the untimely disclosure of the statements was to obtain a continuance--to which he would have been entitled--so he could review his trial strategy in light of the challenge to the alibi. Id. at 883. Because the defendant did not seek this remedy, and instead he sought a harsher remedy to which he was not entitled, he waived the relief otherwise available to him. Id.

In State v. Christofferson, 793 P.2d 944 (Utah App. 1990), on the morning of trial the prosecutor learned of exculpatory statements of the defendant that contradicted an earlier

confession, but the statements were not disclosed to defense counsel. Id. at 947. The defendant did not learn of the statements until they were introduced as testimony. Id. At that time, the defense counsel did not object, move for a continuance, or request a mistrial, but rather the witness was allowed to testify on direct examination, and then cross-examined, before the defense submitted a motion to dismiss for the failure to sooner disclose the exculpatory statement. Id. Finding that the defendant failed to mitigate the prosecutor's discovery violation by not seeking one of the specific remedies afforded by Rule 16(g) of the Utah Rules of Criminal Procedure, the Supreme Court held that the defendant had waived all relief. Id. at 948. Specifically, the Court stated: "*Dismissal is proper only when all other attempts to mitigate damage caused by unexpected evidence have failed.*" Id. (Emphasis added).

The defendant in this case did not comport himself with this Utah case law by seeking to mitigate a discovery violation, but rather he tried to exploit the circumstance in order to manufacture a de facto acquittal without risking a resolution of the case on the merits. Pursuant to Griffiths and Christofferson, however, by engaging in this ploy, the defendant should not profit, but rather he should be viewed as having waived any claim of prejudice whatsoever. This was the position urged by the State at the August 2, 1996, hearing. Finding #8, Findings of Fact, Conclusions of Law, and Order of Dismissal, at appendix B. This is the correct application of law.

B. The Defendant was Never Denied the Opportunity to Have a Fair Trial.

If the defendant had argued that he believed the undisclosed tape might have proved exculpatory,² or otherwise necessary to his defense, then URCrP 16(g) provides remedies other

² An issue which is moot, since the tape is now available to the defendant.

than dismissal. He may have sought a continuance until he was afforded an opportunity to obtain the missing material. Christofferson supra. He could have also sought the tape's exclusion. See, e.g., State v. Kull, 688 P.2d 1327 (Ore. 1984) (defendant entitled to suppression of video tape which was not provided in discovery until four days before trial). Otherwise, if he could not wait because his ability to mount his defense would deteriorate over time, he should have made this argument to Judge Palmer rather than waiting another five months before renewing his attempt to dismiss this case before Judge Dever. By not making these arguments, the State submits that the defendant was never concerned with whether or not this case was delayed, and therefore he has never suffered any prejudice resulting from the tape not being available in October of 1995.

However, assuming, arguendo, that the defendant can articulate that he would have been prejudiced by a continuance in October of 1995, the State asserts that absent an argument that the State acted in bad faith by suppressing the tape, the defendant was never entitled to demand that the prosecutor produce a tape not within its control or suffer a bar to further prosecution. See Arizona v. Youngblood, 488 U.S. 51, 102 L.Ed.2d 281, 109 S.Ct. 333, reh. den. 488 U.S. 1051, 102 L.Ed.2d 1007, 109 S.Ct. 885 (1988). Rather, his most immediate remedy would have been going to trial without the tape.

In Youngblood, investigators negligently stored semen samples and clothing in such a manner that the items were later useless for the performance of tests that would have tended to prove or disprove the defendant's identity as the abductor of a ten-year-old boy who had been sexually assaulted. Id. at 52-5, 102 L.Ed.2d at 285-7. On this issue, the United States Supreme Court noted that the defendant had raised no claim that the State had acted in bad faith in causing

the potential evidence to be unavailable for the defendant's use, and the Court further noted that the defendant could say no more of the evidence than that it *might* have proved exculpatory. *Id.* at 57, 102 L.Ed.2d at 289. Noting precedent set forth in California v. Trombetta, 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984) (holding that DUI defendant was not denied a fair trial for failure to preserve breath test samples which were destroyed in good faith), the Youngblood Court held that “...*unless the criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.*” *Id.* at 58, 102 L.Ed.2d at 289 (emphasis added). In this case, like in Youngblood the defendant has raised no argument that the State suppressed evidence in bad faith.

Moreover, unlike in Youngblood, in this case the evidence was never irretrievably lost, but rather the State merely encountered a delay in causing its production. Noting that URCrP 25(b)(1) specifically allows for the dismissal of a case for unreasonable delay, and that URCrP 25(d) provides that a dismissal for unreasonable delay shall not bar further prosecution, the defendant may be viewed as having been given a proper remedy by the dismissal without prejudice to avoid additional unreasonable delay.³

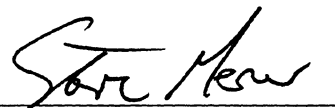
³ The State acknowledges that the defendant would be entitled to a dismissal-with-prejudice if the trial court had found that there had been an unconstitutional delay. See URCrP 25(d). This issue is foreclosed, though, because Judge Dever's findings of fact include the finding that the defendant did not complain of delay. Finding #7, Findings of Fact, Conclusions of Law, and Order of Dismissal, at appendix B.

CONCLUSION

The Court should hold that it is error to construe an order of dismissal as a bar to further prosecution unless the order is accompanied by specific findings supporting the remedy of dismissal-with-prejudice as prescribed by Rule 25 of the Utah Rules of Criminal Procedure. The Court should further hold that the interests of justice are not promoted when a defendant pursues dismissal rather than a fair resolution of the case on its merits, and therefore a defendant is not entitled to dismissal as a remedy unless he makes a showing that no other remedy would afford him a fair trial. In this case, the defendant has not sought a leveling of the playing field to ensure that he will receive a fair trial on the merits; rather, he has instead sought to manipulate a factor beyond the prosecutor's control for the purpose of avoiding trial. On these facts, and from the holdings urged above, the State prays that the Court rule that this case was dismissed in error and remand this case for an expeditious trial.

Respectfully submitted this 12th day of February, 1997.

E. NEAL GUNNARSON
Salt Lake District Attorney, by

A handwritten signature in black ink, appearing to read "Steve Mercer", written over a horizontal line.

STEPHEN MERCER,
Deputy District Attorney

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellant was mailed, postage prepaid, to counsel for appellee, D. Bruce Oliver, at 180 South 300 West, Suite 210, Salt Lake City, Utah 84101-1218, this ____ day of February, 1997.

APPENDIX A

E. NEAL GUNNARSON
Salt Lake County Attorney
STEPHEN MERCER, Bar No. 6931
Deputy County Attorney
2001 South State, S3700
Salt Lake City, Utah 84190
Telephone: (801) 468-3422

IN DIVISION II OF THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR
Plaintiff,	)	RECONSIDERATION
vs.)	
)	
PAUL BURNINGHAM,	)	Case No. 955039908TC
)	
Defendant.	)	Hon. LEE DEVER

The State of Utah, by and through its counsel, Stephen Mercer, submits this memorandum in support of its motion that the Court reconsider its ruling of August 5, 1996, and rescind its order dismissing this case with prejudice.

FACTS

In October of 1995, due to events beyond the control of the prosecutor in this case, the State failed to make discovery materials available to the defendant pertaining to his May, 1995, arrest for DUI. These materials, more specifically a video tape, would be valuable evidence at trial, but the State could have presented its case without the video. Rather than seeking the suppression of the video at trial, or seeking a continuance if the defense felt the video might prove exculpatory, or even arguing that a continuance would further prejudice the defense, the defendant instead argued that he was entitled to a dismissal with prejudice as the remedy for prosecutorial misconduct.

Such a motion was initially denied by Judge Palmer, and when the State could not obtain the video without further delay, and before he entertained another motion by the defendant, Judge Palmer executed an order of dismissal proposed by the State's motion to dismiss without prejudice.

The State refiled the case shortly after the original dismissal without any complaint by the defendant until the case had progressed another six months. The defendant then submitted a memorandum in which he argued that the original dismissal should be viewed as an involuntary dismissal against the State pursuant to the Utah Rules of Civil Procedure, and therefore the State should be barred from further proceedings and ordered to pay costs. At the hearing on the motion on August 5, 1996, the Court rejected the defendant's argument that the Rules of Civil Procedure should apply, but, contrary to the order of dismissal pursuant to the State's motion to dismiss without prejudice, and contrary the State's argument that the defendant was never entitled to a dismissal with prejudice, the Court ruled that the original dismissal had been with prejudice.

ARGUMENT

At the hearing on the motion in this matter, the State and defense each invested a considerable portion of the oral argument to the issue of the applicability of the Rules of Civil Procedure, which the Court found the defendant relied upon erroneously. The State also argued that the order executed by Judge Palmer was proposed by the State in its motion to dismiss without prejudice, but this point was not belabored. It was further argued that the defendant was never entitled to a dismissal with prejudice for the complained of discovery violation, but rather the remedy he should have sought was the suppression of the video tape from trial. Although these arguments were not found

persuasive by the Court at the time of oral arguments, the State now presents the Court with this memorandum to show the authority favoring the reinstatement of this prosecution before executing a final order of dismissal.

I. Pursuant to Rule 25(c), Judge Palmer could not have responded to the State's Motion to Dismiss *Without* Prejudice with a Dismissal *With* Prejudice Without Explicitly Saying So

If the effect of Judge Palmer's order of dismissal of this case was to dismiss this case with prejudice, then this was an appealable order pursuant to Rule 26 of the Utah Rules of Criminal Procedure and the State should have been placed on notice of this pursuant to Rule 25(c) of the Utah Rules of Criminal Procedure. Rule 25(c) requires that orders of dismissal be accompanied by a statement of the reasons therefore. See Salt Lake City v. Dorman-Ligh, 912 P.2d 452 (Utah App. 1996) (construing Rule 25(c)). Where the order in question is accompanied by no contemporaneous statement of reasons contradictory to the State's motion for dismissal without prejudice, the dismissal cannot be viewed as entered for any purpose other than that stated in the motion. See id., at 456. Moreover, **"In the rare case in which the trial court dismisses a criminal information because of the misbehavior of a prosecutor, the court must enter findings that carefully specify which Rule 25 provisions it relied upon."** Id. (Emphasis added).

II. The Defendant had a Duty to Mitigate his Injury

The State next addresses whether dismissal with prejudice is an appropriate remedy if any lesser remedy would relieve the prejudice, if any occurred. The State submits that any prejudice that may have flowed from the delay in providing discovery of the video tape did not significantly hamper the defendant's preparation of his defense

because the tape only depicts an event in which the defendant was a participant, and which both the defendant and the arresting officer can testify. As a participant himself, the defendant should be able to inform his counsel of the contents of the tape so that its preview would not be a necessary prerequisite for trial preparation.

Moreover, even if the Court views the preview of the tape as a necessity in the defendant's preparation for trial, the Court cannot view the introduction of the video tape as essential to case against the defendant because many, if not most, DUI trials proceed in the absence of such video taped evidence. Therefore, this case could have proceeded to trial without prejudice to the defendant simply by ordering the tape inadmissible in the State's case in chief. See State v. Kull, 688 P.2d 1327 (Ore. 1984) (defendant entitled to suppression of video tape which was requested in discovery but which was not produced until four days before trial). Accordingly, since the defendant could have mitigated the effect of not previewing the tape by obtaining an order of suppression, he was not entitled to any other relief pursuant to Rule 16(g) of the Utah Rules of Criminal Procedure. State v. Christofferson, 793 P.2d 944, 947-8 (Utah App. 1990), State v. Griffiths, 752 P.2d 879, 882 (Utah 1988)..

In Christofferson, a police detective brought to the prosecutor's attention on the day of trial a material statement of the defendant, but the prosecutor did not make this known to the defense until the witness recounted the statement in his testimony. Upon hearing the statement, defense counsel did not object, move for a continuance, or move for a mistrial, but rather he later moved for a dismissal with prejudice as the remedy for prosecutorial misconduct. The trial court denied the defendant's motion, and on the defendant's appeal the Utah Court of Appeals affirmed the trial court by holding that a defendant has a duty to mitigate the affect of a discovery violation, and if he pursues a

dismissal where a less harsh remedy would relieve the prejudice, then he waives the claim of prejudice. Id.

This rule continues the line of reasoning employed by the Utah Supreme Court in Griffiths. In Griffiths, the defendant was confronted just before trial with statements attributed to him which had not been disclosed earlier in discovery because a police investigator had not provided them to the prosecutor. These statements were pivotal to the defense because they contradicted the account of an alibi witness. Rather than moving for a continuance before trial to re-evaluate the defense that would be presented, the defendant objected to the admission of the statements, and when they were admitted, he moved for a mistrial. Just like the holding in Christofferson, the Supreme Court held in Griffiths that the defendant's failure to timely seek a less harsh remedy which would adequately relieve the prejudice operated as a waiver of any relief under Rule 16(g) of the Utah Rules of Criminal Procedure. Griffiths at 883.

Applying the reasoning of Christofferson and Griffiths to this case, the State argues that because this trial could have gone forward without any prejudice to the defendant if the video at issue were never introduced by the State, and because the defendant has not pursued this remedy, but rather he has pursued a dismissal with prejudice, he has failed to mitigate the discovery violation and accordingly he has waived any right to relief under Rule 16(g) of the Rules of Criminal Procedure.

CONCLUSION

Pursuant to the rules established by State v. Christofferson and State v. Griffiths, the defendant was not entitled to pursue the remedy of dismissal if a less harsh remedy would have alleviated any actual or anticipated prejudice. By foregoing these less harsh remedies, the defendant has waived any claim to relief under Rule

Memo re: Motion for Reconsideration

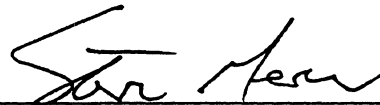
State v. Burningham

Page 6

16(g) of the Utah Rules of Criminal Procedure. Moreover, because it is rare that a defendant is ever entitled to dismissal with prejudice as a remedy for prosecutorial misconduct, and because Judge Palmer's order of dismissal in response to the State's motion to dismiss without prejudice does not show any reason why it should be viewed as a dismissal with prejudice as is required by Rule 25(c), the Court should now reject the defendant's assertion that the State is barred, and allow this case to proceed to trial.

DATED this 8th day of August, 1996.

E. NEAL GUNNARSON
District Attorney for Salt Lake County

A handwritten signature in black ink, appearing to read "Stephen Mercer", written over a horizontal line.

STEPHEN MERCER
Deputy District Attorney

APPENDIX B

E. NEAL GUNNARSON
Salt Lake County Attorney
STEPHEN MERCER, Bar No. 6931
Deputy County Attorney
2001 South State, S3700
Salt Lake City, Utah 84190
Telephone: (801) 468-3422

FILED
96 SEP 27 PM 3:27
CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH

IN DIVISION II OF THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, and
Plaintiff,	)	ORDER OF DISMISSAL
vs.)	
)	
PAUL BURNINGHAM,	)	Case No. 955039908TC
)	
Defendant.	)	Hon. LEE DEVER

This matter having come before the Court on August 2, 1996, on the defendant's motion to dismiss on the ground that further prosecution in this case is barred pursuant to Rule 41 of the Utah Rules of Civil Procedure, and the Court having considered the argument presented on behalf of the defendant by D. Bruce Oliver, and having considered the argument presented on behalf of the State by Stephen Mercer, and the Court declining the State's motion for reconsideration, the following findings of fact, conclusions of law, and order are entered in writing as mandated by Rule 25 of the Utah Rules of Criminal Procedure:

FINDINGS OF FACT

1. On May 30, 1995, a criminal prosecution was commenced against the defendant relating to an allegation arising from conduct occurring on May 17, 1995.

Findings, Conclusion and Order

State v. Burningham

Page 2

The matter, which was issued the case number 955017625 TC, was assigned to Judge Phillip K. Palmer.

2. On August 21, 1995, the defendant filed a motion for discovery.

3. On October 23, 1995, a hearing was held on the defendant's motion to compel discovery of a video tape which recorded the defendant's stop and arrest. Pursuant to that motion, the State was ordered to produce the tape within 5 days or the case would be dismissed.

4. Having failed to obtain the tape from the arresting officer so that it could be provided as ordered, the State moved to dismiss this case on October 31, 1995.

5. On November 1, 1995, Judge Palmer executed the order proposed by the State. That order was silent as to whether to dismissal was to be with or without prejudice.

6. On November 29, 1995, the State refiled charges in this matter. The case was then issued case number 955039908 TC and assigned to this Court.

7. On May 13, 1996, Bruce Oliver filed a memorandum of law in support of a motion to dismiss on the grounds of a bar pursuant to the rules of civil procedure. The defendant has sought dismissal as his only remedy since first complaining of a discovery violation. The defendant has never complained that the result of the discovery violation was a denial of his right to a speedy trial.

8. On August 2, 1996, this Court conducted a hearing on the defendant's motion. During this hearing, in addition to contesting the defendant's assertion that the rules of civil procedure did not control, the State also argued that the defendant was never entitled to dismissal as a remedy for a discovery violation is some less severe remedy would redress the discovery violation.

CONCLUSIONS OF LAW

1. Although the Utah Rules of Civil Procedure govern in criminal cases where there are no other applicable rules or statutes, Rule 25 of the Utah Rules of Criminal Procedure (URCrP) governs the dismissal of criminal cases without trial, and therefore the defendant improperly looks outside of the URCrP for support of his motion to dismiss that case.

2. Because the defendant does not properly rely on the rules of civil procedure in support of his motion, his demand for fees cannot be granted.

3. Although the defendant has not argued that the effect of Judge Palmer's Order of Dismissal was with prejudice, because the State did not move to dismiss until after Judge Palmer's admonition to provide discovery within five days had expired, the effect of that order was the dismissal of this case with prejudice.

ORDER

As a result of the State's failure to provide discovery as originally ordered by Judge Palmer, this case is ordered dismissed with prejudice.

BY THE COURT this ____ day of October, 1996.

LEE A. DEVER
District Court Judge

Approved as to form:

D. BRUCE OLIVER
Counsel for Defendant

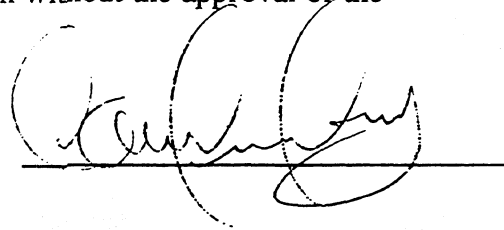
Findings, Conclusion and Order

State v. Burningham

Page 4

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certify that an original and a copy of these proposed findings of fact, conclusions of law and order of dismissal were provided to D. Bruce Oliver, counsel for the defendant, by mailing them to 180 South 300 West, Suite 210, Salt Lake City, Utah 84101-1218, on this 24th day of September, 1996. I further certify that a copy of this document has been filed with the court, and that the original is to be approved by counsel for the defendant within ten days of filing, or a duplicate original will be submitted to the court for adoption without the approval of the defendant.

A handwritten signature in cursive script, appearing to read "D. Bruce Oliver", is written over a horizontal line.

PARTIAL TRANSCRIPT
PAUL BURNINGHAM HEARING
AUGUST 2, 1996

15 min Oliver addresses Court

28 min State addresses Court ("never entitled to dismissal" at 31 minutes)

32 min Oliver again addresses Court

35 min Court rules. Judge Lee Dever:

"I think the appropriate place to look in determination of what it is going to be here is the orders that have been previously entered in case number 955017625. First of all, I agree with the State that the Rules of Civil Procedure do not apply in this case because there are specific rules in the Rules of Criminal Procedure that apply and therefore they take precedent over any civil rules because that's what the statute so provides. There's [sic] two issues here. Whether or not there should be a dismissal pursuant to rule 16 or 25, as the case may be, the question really is whether a dismissal based on a court order can be deemed to be dismissal with prejudice in a criminal matter if it is not for grounds that are specifically provided for in the Rule. If you look at Rule 25, which is dismissal without trial, which I believe is what we are doing here--this is a dismissal without trial-- it talks about if the dismissal is under certain grounds--unconstitutional delay or statute of limitations--it is a bar. However, it does not talk about whether it is a dismissal with prejudice, and therefore barred, if it is for other grounds. However, the Rule also provides that in its discretion, for substantial cause and in furtherance of justice, the Court may, of its own initiative, order it dismissed. The question is: Can the Court provide how the dismissal is to be? In this particular matter, the record indicates the plaintiff, I mean the defendant in this matter, requested discovery on August 21, 1995, then on September 29, 1995, they wanted to look at the video. If by October 23, 1995, if the State had not made it available, the Court denied the motion for dismissal at that time, and stated that the State had five days to provide the tape, and stated on the docket that if the tape is not provided the case will be dismissed. The five days ordered by the Court ran on the 30th of October, either the fact that that was a weekend intervening, nothing was filed by the State at that time. On the 31st, the State filed the motion to dismiss. The question then becomes whether or not the State has the right to refile in this matter? It is my reading that underneath Rule 16 or Rule 25, that it is in the docket in this matter that the Court intended to order a dismissal in this case, and did order a dismissal. Giving the State three months in which to respond, I am going to order that my interpretation of this matter is that the case was dismissed and I will grant the defendant's motion in this matter to dismiss this matter in case number 955039908 and I'll order that it be dismissed with prejudice."

"I don't believe the issue of fees is appropriate because it is handled under rules of civil procedure, therefore that motion, that request, is denied."

APPENDIX C

THIRD CIRCUIT COURT - SLC

WEDNESDAY JUNE 5, 1996
3:19 PMDefendant

Citation: D240640

UHP Case: 955017625 TC
Agency No.: RID95381

BURNINGHAM, PAUL SERGE

Traffic Court Case
Judge: Philip K. Palmer610 SOUTH 1ST EAST
BOUNTIFUL UT 84010NO OTN # FOR THIS CASEChargesBail

Violation Date: 05/17/95

1. DRIVING UNDER THE INFLUENCE OF ALC/DRUGS	41-6-44	602.00
Sev: MB	Attrib: L,	
2. RED LIGHT VIOL	41-6-24	52.00
Sev: MC		
3. DRIVE ON SUSPENDED LICENSE	53-3-227.S	302.00
Sev: MB		

Proceedings

05/30/95	Case filed on 05/30/95.	KWS
	ARR scheduled for 8/14/95 at 9:00 A in room 3 with PKP	KWS
	PRE-TRIAL RELEASE AGREEMENT FILED	TSB
06/05/95	D A NOTIFIED BY NOTICE OF ARR	RBM
08/14/95	Mis Arraignment JUDGE: Philip K. Palmer	KHB
	TAPE: 1832 COUNT: 3041	KHB
	ATD: None Present	KHB
	Deft is present	KHB
	Information was read in court	KHB
	PTC scheduled for 08/25/95 at 0900 A in room ? with PKP	KHB
	Chrg: 41-6-44 Plea: Not Guilty	KHB
	Chrg: 41-6-24 Plea: Not Guilty	KHB
	Chrg: 53-3-227.S Plea: Not Guilty	KHB
	DEFENDANT WILL HIRE BRUCE OLIVER	KHB
08/16/95	FILED ANSWER TO REQUEST/MOTION FOR DISCOVERY	DGP
08/22/95	JUDGE PALMER SIGNED MOTION AND ORDER FOR CONTINUANCE	KHB
	PTC rescheduled to 9/11/95 at 9:00 A in room ? with PKP	KHB
	CLERK NOTIFIED ATD BRUCE OLIVER BY PHONE AND SENT COPY OF	KHB
	DOCKET ENTRY TO DIST ATTY	KHB
08/23/95	FILED APPEARANCE OF COUNSEL (BRUCE OLIVER) PLEA OF NOT GUILTY	DGP
	AND DEMAND FOR A JURY TRIAL	DGP
	FILED REQUEST FOR DISCOVERY	DGP
08/28/95	FILED MOTION AND ORDER FOR CONTINUANCE	DGP
09/01/95	PALMER/KHB OFF TAPE C/O CLEAR DATE WITH ATD	KHB
	CLERK CALLED ATTY BRUCE OLIVER AND CLEARED DATE OF 9/29/95 AT	KHB
	2:00 PM WITH HIS SECRETARY	KHB
	CLERK NOTIFIED DIST ATTY BY SENDING A COPY OF THIS DOCKET ENTRY	KHB
	PTC rescheduled to 9/29/95 at 2:00 P in room ? with PKP	KHB
09/29/95	Hearing (PRE-TRIAL CONFERENCE): JUDGE: Philip K. Palmer	KHB
	TAPE: 2116 COUNT: 3069	KHB
	Deft Present	KHB

Call Sim Gill Dist Atty's office -
468-3422

THIRD CIRCUIT COURT - SLC

WEDNESDAY JUNE 5, 1996

3:19 PM

Defendant

Citation: D240640

UHP Case: 955017625 TC

Agency No.: RID95381

Traffic Court Case

BURNINGHAM, PAUL SERGE

09/29/95	ATD: OLIVER, BRUCE	PRO: BAKER, LARRY	KHB
	PTC	scheduled for 10/23/95 at 1100 A in room ? with PKP	KHB
	ON MOTION OF DEF, C/O CONTINUE PRETRIAL CONFERENCE		KHB
	DEF REPORTED THEY NEED TO LOOK AT VIDEO TAPE		KHB
10/23/95	Hearing (PRE-TRIAL CONFERENCE):	JUDGE: Philip K. Palmer	KHB
	TAPE: 2361	COUNT: 650	KHB
	Deft Present		KHB
	ATD: OLIVER, D BRUCE	PRO: KISHNER, SHARON	KHB
	MO CRIM	scheduled for 11/06/95 at 0900 A in room ? with PKP	KHB
	STATE HAS NOT MADE TAPE AVAILABLE - PROBLEMS GETTING FROM THE		KHB
	OFFICER (OFFICER IS NOW IN PANGUITCH)		KHB
	COURT DENIES DEF MOTION FOR DISMISSAL AT THIS TIME		KHB
	COURT GRANTS STATE MOTION FOR 5 DAYS TO PROVIDE TAPE TO DEF		KHB
	C/O CONTINUE FOR MOTION HEARING, IF TAPE IS NOT PROVIDED THE		KHB
	CASE WILL BE DISMISSED		KHB
10/31/95	FILED MOTION TO DISMISS		DGP
	PALMER ENTERED ORDER OF DISMISSAL		DGP
11/01/95	MO CRIM on 11/ 6/95 was cancelled		DGP
	Entered case disposition of: Dismissed		DGP
	Chrg: 41-6-44	Find: Dismissed	DGP
	Chrg: 41-6-24	Find: Dismissed	DGP
	Chrg: 53-3-227.S	Find: Dismissed	DGP
11/06/95	Archive Box Number entered was 95TC35		BAT
	Citation Amount:		

Additional Case Data

Sentence Summary

1. DUI	Plea: Not Guilty	Find: Dismissed
2. RED LIGHT	Plea: Not Guilty	Find: Dismissed
3. DRIVE ON SUSP LI	Plea: Not Guilty	Find: Dismissed

Case Disposition

Disposition....: Dismissed

DATE: 11/01/95

Parties

Atty for Defendant

OLIVER, D BRUCE
180 SOUTH 300 WEST
SUITE 260
SALT LAKE CITY UT 84101

Home Phone: () -
Work Phone: () -

Personal Description

Sex: M DOB: 04/20/63
Dr. Lic. No.: 13229566

State: UT Expires:

APPENDIX D

E. NEAL GUNNARSON
District Attorney for Salt Lake County
SHARON KISHNER, Bar No. 5741
Deputy District Attorney
2001 South State, Room #S3700
Salt Lake City, Utah 84190-1210
Telephone: (801) 468-3422

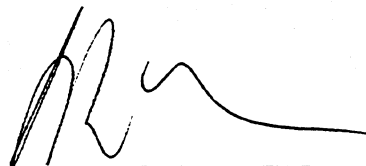
IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff,	)	MOTION TO DISMISS
)	
-vs-)	
	)	Case No. 955017625TC
PAUL BURNINGHAM,)	
	)	Hon. Philip K. Palmer
Defendant.)	

SHARON KISHNER, attorney for plaintiff, moves this court for an order dismissing the above-entitled matter without prejudice, for the reason that as of this date, the State has been unable to produce the videotape of the incident.

DATED this 30th day of October, 1995.

E. NEAL GUNNARSON
District Attorney for Salt Lake County



SHARON KISHNER
Deputy District Attorney

APPENDIX E

E. NEAL GUNNARSON
District Attorney for Salt Lake County
SHARON KISHNER, Bar No. 5741
Deputy District Attorney
2001 South State, Room #S3700
Salt Lake City, Utah 84190-1210
Telephone: (801) 468-3422

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
Plaintiff,	)	ORDER OF DISMISSAL
)	
-vs-	)	Case No. 955017625TC
PAUL BURNINGHAM,)	
Defendant.	)	Hon. Philip K. Palmer

Based upon the motion of the Plaintiff,

IT IS HEREBY ORDERED that the information in the above-entitled matter be dismissed.

DATED this ____ day of October, 1995.

BY THE COURT:

PHILIP K. PALMER
MAGISTRATE

Note: The signed original order of dismissal was not available for duplication at the time of the preparation of this brief.

APPENDIX F

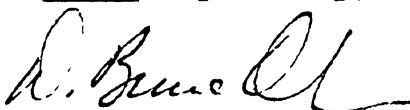
D. Bruce Oliver #5120
Attorney for Defendant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	MOTION TO DISMISS
Plaintiff,	:	
	:	
vs.	:	Case No. 955039908
PAUL SERGE BURNINGHAM,	:	
	:	Judge LEE DEVER
Defendant.	:	

Comes now the defendant above named by and through counsel, D. Bruce Oliver, and hereby moves this Court to dismiss this action against defendant based upon the Utah State Constitution Article I, section 12, the Fifth Amendment to the U.S. Constitution, Utah Rules of Criminal Procedure 16 and Utah Rules of Civil Procedure 41, and the accompanying Memorandum of Points and Authorities, which is incorporated herein by this reference.

RESPECTFULLY SUBMITTED this 9 day of May, 1996.



D. BRUCE OLIVER
Attorney for Defendant

12 1710
D. Bruce Oliver #5120
Attorney for Defendant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM OF POINTS AND
	:	AUTHORITIES SUPPORTING
Plaintiff,	:	MOTION TO DISMISS
	:	
vs.	:	
	:	Case No. 955039908
PAUL SERGE BURNINGHAM,	:	Judge LEE DEVER
	:	
Defendant.	:	

Comes now the defendant above named by and through counsel, D. Bruce Oliver, and hereby submits the following Memorandum of Points and Authorities in Support of his Motion to Dismiss, which Motion is incorporated herein by this reference.

FACTS

1. Defendant was arrested for Driving Under the Influence of Alcohol of May 17, 1995.
2. That this case was originally filed before Judge Palmer.
3. Defendant filed a Request for Discovery.

4. At the time of the Pre-trial in this matter defendant requested a copy of the tape recording made at the time of the arrest of Defendant.

5. That Judge Palmer ordered that the tape be provided to Defendant.

6. That Defendant provided the prosecutor with a blank tape to make the copy.

7. The State filed a Motion to Dismiss the action along with an Order to be signed by Judge Palmer.

8. That the action was dismissed.

9. That the prior case number was 955017652TC.

ARGUMENT

Both the Constitution of the United States and the Constitution of the State of Utah provide that a person may not be placed in jeopardy twice for the same offense. Article I, section 12 of the Utah State Constitution provides as follows:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the

same offense. (emphasis added)

Id. The Fifth Amendment to the United States Constitution provides as follows:

[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

Id. Each of these provisions provides that once a person has been placed in jeopardy then that same person may not again be placed in jeopardy for the same offense. This is a well established point of law.

In the current case Mr. Burningham has been placed in jeopardy and the case was dismissed. He has now been placed in jeopardy a second time for the same offense. This time it has been increased to a class A misdemeanor from a class B misdemeanor in front of Judge Palmer. The refiling of the case is extremely punitive. The prosecution of Mr. Burningham is barred by double jeopardy and therefore the case should be dismissed.

This case is further barred by the fact that it was dismissed with prejudice and therefore may not be refiled again. The Utah Rules of Criminal Procedure Rule 16 provides:

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor

shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the

court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Id. In this rules it allows and permits discovery to be had between the parties. The Court is allowed the discretion to determine the limits of the discovery. The Court is further allowed to set out the consequences of a parties failure to participate in discovery or for failure to comply with the Court's Order concerning discovery. In the current case both parties were advised by the Court on October 23, 1995 that the case would be dismissed if indeed the tape was not produced to defendant. On October 31, 1995 the State filed a Motion to Dismiss. On that same date Judge Palmer entered his Order of Dismissal. This is all in accordance with the Utah Rules of Criminal Procedure Rule 16.

Utah Rules of Civil Procedure Rule 81 (e) provides as follows:

Rule 81. Applicability of rules in general.

(a) Special statutory proceedings. These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for

procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) Probate and guardianship. These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) Procedure in city courts and justice courts. These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein.

(d) On appeal from or review of a ruling or order of an administrative board or agency. These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) Application in criminal proceedings. These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

Id. Subsection (e) provides that the Utah Rules of Civil Procedure apply to criminal matters at any time when they are not in specific conflict with any other provision or are unconstitutional. The Utah Rules of Civil Procedure Rules 41 provides as follows:

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a

stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By order of court. Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is

served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or undertaking to be delivered to adverse party. Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained. (emphasis added)

Id. In the current case the dismissal of the action was by the plaintiff's Motion to Dismiss. In the Order prepared by the plaintiff there is no reference to the dismissal being without prejudice. This would mean that the dismissal was with prejudice and on the merits. Understanding that the matter has been dismissed on the merits it is inappropriate that this matter be refiled. The law of the case is that the case has been dismissed. Defendant is entitled to the application of res judicata, or double jeopardy or both. If the State is free to refile then at a minimum the threat of Judge Palmer to dismiss for failure to comply with discovery orders is hollow and without substance.

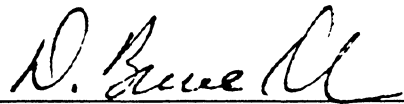
Further the provisions of Utah Rules of Civil Procedure Rule 41 provide that the party refileing an action after previous dismissal should pay the costs of the prior case for the opposing party. This would be appropriate if indeed the Court permits this matter to go forward. In the alternative if this Court

agrees with defendant then sanctions pursuant to Utah Rules of Civil Procedure are in order and those sanctions should be commensurate with the cost to the defendant of the second case. This matter should be dismissed and no further action taken by the State.

CONCLUSION

Therefore, based on the foregoing, Defendant respectfully requests this Court to dismiss this action. Defendant has twice been put in jeopardy since the first action was dismissed with prejudice.

RESPECTFULLY SUBMITTED this 9 day of May, 1996.



D. BRUCE OLIVER
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION TO DISMISS, postage prepaid, to: Salt Lake District Attorney, 231 East 400 South, Suite 300, Salt Lake City, Utah 84111.

Dated this 9th day of May, 1996.

